

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ATE KAYS COMPANY,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 00-CV-3693
PENNSYLVANIA CONVENTION	:	
CENTER AUTHORITY	:	
and	:	
ROBERT BUTERA,	:	
Defendants.	:	

**MEMORANDUM**

**GREEN, S.J.**

**November     , 2000**

Presently pending is Defendants Pennsylvania Convention Center Authority and Robert Butera's Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1), Plaintiff's Response and Defendants' Reply. For the following reasons, Defendants' motion will be denied.

**I. FACTUAL BACKGROUND**

Plaintiff ATE Kays Company is an alleged New York general partnership. (Compl. ¶ 11.) In 1983, Plaintiff purchased and renovated an eleven (11) story commercial office building located at 121 North Broad Street in Philadelphia, Pennsylvania. Plaintiff began leasing office space in the building to commercial tenants. In 1994, the Pennsylvania Convention Center Authority<sup>1</sup> opened a new facility, the Pennsylvania Convention Center, a few blocks east of Plaintiff's property.

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<sup>1</sup>Plaintiff alleges that the Pennsylvania Convention Center Authority is a public instrumentality of the Commonwealth of Pennsylvania. (Compl. ¶ 12.)

After the Convention Center opened, the Pennsylvania Convention Center Authority and its President and Chief Executive Officer Robert Butera (hereinafter “Defendants”) allegedly began making public and private statements suggesting that the condemnation and demolition of Plaintiff’s property was imminent and certain due to a potential expansion of the Convention Center. (Compl. ¶¶ 4-7.) Plaintiff claims that Defendants knew that an expansion plan for the Convention Center was neither approved nor funded, and therefore not imminent or certain. However, Defendants allegedly continued to make statements to the contrary in order to generate support for an expansion, and to lower property values in the area in the event that an expansion might be approved in the future. (Compl. ¶¶ 4-7.)

In the Spring of 1999, Plaintiff attempted to negotiate the renewal of a long-term lease with the Probation Department of the Philadelphia Court System, a tenant occupying two-thirds of Plaintiff’s building. (Compl. ¶ 19.) During those negotiations, newspaper articles disclosed the proposed expansion of the Convention Center into Plaintiff’s property, allegedly based on statements made by Defendants. The Probation Department subsequently notified Plaintiff that it “would not be renewing its lease.” (Compl. ¶ 22.) Instead, the Probation Department allegedly signed a twenty (20) year lease with another lessor at a higher cost than Plaintiff’s proposed lease renewal terms. (Compl. ¶¶ 22-23.)

Plaintiff filed the instant Complaint on or about July 21, 2000. In Count I, Plaintiff alleges that its constitutional rights under 42 U.S.C. § 1983 were violated when Defendants, in their capacity as government actors, allegedly made statements concerning the possible condemnation of Plaintiff’s property. (Compl. ¶¶ 39, 46.) As a consequence, Plaintiff claims that it was deprived of the right to enjoy private property free of unreasonable government

interference, the right to substantive due process, and the right of equal protection. (Compl. ¶ 42.) Plaintiff also asserts three (3) state law claims—intentional interference with existing contract relations in Count II; intentional interference with prospective contract relations in Count III; and constructive trespass in Count IV.

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants filed a Motion to Dismiss Counts I and II of the Complaint for failure to state a claim upon which relief can be granted. Defendants also moved to dismiss the Complaint in its entirety for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). Plaintiff filed a response and Defendants replied.

## **II. DISCUSSION**

When considering a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the district court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990)(citation omitted). Dismissal is proper only where “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hison v. King & Spalding, 467 U.S. 69, 73 (1984). The court must also dismiss claims over which it has no subject matter jurisdiction. See Fed. R. Civ. P. 12(b)(1); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

### **A. Count I**

To state a claim under 42 U.S.C. § 1983, the plaintiff must prove that he suffered a violation of rights, privileges or immunities created by the Constitution and federal law at the hands of a person acting under color of state law. See Karnes v. Skrutski, 62 F.3d 485, 490 (3d Cir. 1995). A plaintiff who alleges a “taking” or inverse condemnation claim must first exhaust

state remedies before filing a Section 1983 claim. Peduto v. City of North Wildwood, 878 F.2d 725, 729 (3d Cir. 1989). Under Pennsylvania law, a “de facto” taking or inverse condemnation occurs when an entity, clothed with power of eminent domain, substantially deprives an owner of the beneficial use and enjoyment of his property. See Conroy-Prugh Glass Co. v. Commonwealth, 321 A.2d 598, 599 (Pa. 1973) (quoting Griggs v. Allegheny Co., 168 A.2d 123, 124 (Pa. 1961)); Zettlemyer v. Transcontinental Gas Pipeline Corp., 657 A.2d 920, 923 (Pa. 1995) (quoting Redevelopment Authority of Oil City v. Woodring, 445 A.2d 724, 726-27 (Pa. 1982)).<sup>2</sup>

In the instant matter, Defendants move to dismiss Count I of the Complaint for failure to state a claim upon which relief can be granted. Defendants argue that Count I is an inverse condemnation claim and, as such, Plaintiff is required to, but failed to, exhaust state law remedies prior to bringing a Section 1983 action. Specifically, Defendants contend that Plaintiff failed to exhaust the remedy of Section 1-502(e) in the Pennsylvania Eminent Domain Code;<sup>3</sup> therefore, Plaintiff’s Section 1983 claim is premature.

Plaintiff responds that Count I is not an inverse condemnation claim, and thus it was not required to exhaust state law remedies. Instead, Plaintiff argues that Count I states a valid Section 1983 claim, because it alleges that Defendants acted under color of state law with the

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<sup>2</sup>“In a normal takings case, the taking occurs when the government acts to condemn property in the exercise of its power to eminent domain, while the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.” Peduto, 878 F.2d at 728 n.4 (citing First English Evangelical Church v. Los Angeles Co., 482 U.S. 304, 316 (1987)).

<sup>3</sup>The Pennsylvania Eminent Domain Code states that “[i]f there has been a compensable injury suffered and no declaration of taking has been filed, a condemnee may file a petitioner for appointment of viewers . . . .” 26 P.S. § 1-502(e).

power to commence an eminent domain proceeding, and misused that power by making reckless and indifferent statements to the media. (Compl. ¶ 42.)

While Defendants would characterize Count I as an inverse condemnation claim, Count I may also be characterized as a Section 1983 claim. Count I alleges that Defendants, acting under color of state law, misused their power by making statements that were not rationally related to any governmental interest, but were instead motivated by self interest in lowering Plaintiff's property value. Viewing the facts in the light most favorable to Plaintiff, Count I alleges facts that, if proven, would constitute unlawful deprivation of private property rights under Section 1983. As previously stated, dismissal of a claim is proper only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hison, 467 U.S. at 73. Therefore, dismissal of Count I is inappropriate at this stage of the proceedings. Defendants' Motion to Dismiss Count I for failure to state a claim will be denied.

## **B. Count II**

In order to state a claim for intentional interference with existing contract relations, the plaintiff must show (1) the existence of a contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant intended to harm the existing relation; (3) no justification or privilege on the part of the defendant; and (4) actual damages as a result of the defendant's conduct. Pawlowski v. Smorto, 588 A.2d 36, 39-40 (Pa. Super. 1991). The cause of action will not stand "unless there has been some act by the defendant which served to deprive the plaintiff of some benefit to which he was entitled by contract." Al Hamilton Contracting Co. v. Cowder, 644 A.2d 188, 191 (Pa. Super. 1994) (citing Keifer v. Cramer, 51 A.2d 694, 695 (Pa. 1947)).

Defendants move to dismiss Count II on grounds that it fails to allege the first and fourth elements of the claim. Defendants argue that the Count II does not state that any existing contract was breached or that any damages resulted from Defendants' statements. Plaintiff responds that Defendants intentionally interfered with Plaintiff's existing contract relationships with its tenants, particularly the Probation Department, by making statements that Plaintiff's building would be condemned and demolished. As a result of Defendants' statements, Plaintiff alleges the Probation Department did not renew its lease. Plaintiff claims that it suffered and continues to suffer actual damages.

Although Defendants contend that they did not interfere with Plaintiff's existing contracts, the court does not have the benefit of reviewing said contracts. Instead, the court must rely on the facts pled in the Complaint, which must be taken as true. Count II alleges that the Probation Department did not exercise the option to renew its lease based in part on statements made by Defendants. In addition, Count II alleges that Plaintiff suffered and continues to suffer actual damages. Viewing the evidence in the light most favorable to the Plaintiff, Count II alleges sufficient facts to satisfy the first and fourth elements of a claim for intentional interference with existing contract relations. Accordingly, Defendants' Motion to Dismiss Count II for failure to state a claim will be denied.

### **C. Jurisdiction**

A district court shall have subject matter jurisdiction over all civil actions (1) arising under the Constitution, laws, or treaties of the United States or (2) between citizens of different states where the matter in controversy exceeds \$75,000. See 28 U.S.C. §§ 1331-32. In addition, the court shall have supplemental jurisdiction over "all other claims that are so related to

claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a).

Defendants move to dismiss the Complaint for lack of subject matter jurisdiction. Specifically, Defendants argue that this court lacks subject matter jurisdiction over Count I, because Count I alleges an inverse condemnation claim. Absent jurisdiction over Count I, Defendants assert that this court lacks supplemental jurisdiction over Counts II, III and IV, Plaintiff’s state law claims. Therefore, Defendants move to dismiss the Complaint in its entirety.

As previously discussed, Count I alleges a valid Section 1983 claim. Therefore, this court has subject matter jurisdiction over Count I as a federal question claim, and Defendants motion to dismiss Count I for lack of subject matter jurisdiction will be denied. Because Counts II, III and IV arise from the same controversy as Count I, this court also has supplemental jurisdiction over those claims. See 28 U.S.C. § 1367(a). Thus, Defendants’ motion to dismiss the Complaint in its entirety for lack of subject matter jurisdiction will also be denied.

Defendants alternatively argue that this court should dismiss Counts II, III and IV for lack of subject matter jurisdiction, because there is no diversity of citizenship between the parties. Defendants state that diversity jurisdiction is lacking, because Plaintiff failed to plead sufficient facts to determine the citizenship of Plaintiff’s constituent partners. Plaintiff, however, contends that diversity of citizenship is present between the parties because (1) Plaintiff’s partners are alleged citizens of New York and New Jersey respectively and Defendants are alleged citizens of Pennsylvania, and (2) the amount in controversy exceeds \$75,000. (Compl. ¶¶ 11-14; Pl.’s Ex. A.) In support of its argument, Plaintiff incorporates the sworn Declaration of Myron J. Berman

(“Berman”), a general partner of Plaintiff’s partnership. (Pl. Ex. A.). Berman’s declaration states that no partner of Plaintiff’s partnership is a citizen of Pennsylvania. (Pl. Ex. A.).

Upon reading the Complaint together with the affidavit, I am satisfied that diversity jurisdiction exist. Therefore, Defendants’ motion to dismiss Counts II, III and IV for lack of subject matter jurisdiction is denied. Plaintiff may wish to restate the diversity jurisdiction averments in an Amended Complaint, and leave is granted for Plaintiff to do so.

An appropriate Order follows.



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PENNSYLVANIA CONVENTION	:	
CENTER AUTHORITY	:	
and	:	
ROBERT BUTERA,	:	
	:	
Defendants.	:	

**ORDER**

**AND NOW**, this        day of November, 2000, upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint, Plaintiff's Response and Defendants' Reply, **IT IS HEREBY ORDERED** that Defendants' motion is **DENIED**. **IT IS FURTHER ORDERED** that Plaintiff may file an Amended Complaint within twenty (20) days of this Order.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.